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BEFORE THE
SURFACE TRANSPORTATION BOARD

STB Ex Parte No. 582

PUBLIC VIEWS ON MAJOR RAIL CONSOLIDATIONS

Office of the Secretary

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Part of
Public Record

EDISON MISSION ENERGY COMPANY'S AND
MIDWEST GENERATION, LLC'S
MOTION FOR LEAVE TO FILE COMMENTS

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February 28, 2000

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BEFORE THE
SURFACE TRANSPORTATION BOARD

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EDISON MISSION ENERGY COMPANY'S
AND MIDWEST GENERATION, LLC'S
MOTION FOR LEAVE TO FILE COMMENTS

Edison Mission Energy Company ("Edison Mission") and its affiliate Midwest Generation, LLC ("Midwest Generation") hereby move for leave to file the accompanying comments in this proceeding; Edison Mission and Midwest Generation do not seek leave to participate in the hearings which have been scheduled for March 7-10, 2000.

The instant proceeding did not come to the attention of Edison Mission and Midwest Generation until after February 8, 2000, the date by which written notices of intent to participate were due to be filed with the Board. Although learning of the proceeding too late to participate in the upcoming hearing, Edison Mission and Midwest Generation have deep concerns regarding the severe service disruptions which have resulted from the major rail mergers of the 1990's and the doubtlessly worse disruptions that would flow from the proposed BNSF/CN merger and the responsive rail mergers it would trigger.

Accordingly, Edison Mission and Midwest Generation request that the Board grant them leave to file the attached Statement and Summary of Statement, to apprise the Board of their concerns and to set forth certain proposals for addressing these concerns.

Respectfully submitted,

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February 28, 2000

CERTIFICATE OF SERVICE

I hereby certify that on this 28th day of February, 2000 a copy of the foregoing Edison Mission Energy Company's and Midwest Generation, LLC's Motion for Leave To File Comments was served by first-class mail, postage prepaid, or as otherwise noted, on the following:

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BEFORE THE
SURFACE TRANSPORTATION BOARD

STB Ex Parte No. 582

PUBLIC VIEWS ON MAJOR RAIL CONSOLIDATIONS

STATEMENT AND SUMMARY OF STATEMENT OF
EDISON MISSION ENERGY COMPANY AND MIDWEST GENERATION, LLC

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BEFORE THE
SURFACE TRANSPORTATION BOARD

STB Ex Parte No. 582

PUBLIC VIEWS ON MAJOR RAIL CONSOLIDATIONS

SUMMARY OF STATEMENT
OF
EDISON MISSION ENERGY COMPANY
AND
MIDWEST GENERATION, LLC

Edison Mission Energy Company and its affiliate Midwest Generation, LLC propose that the Surface Transportation Board adopt a new regulation to prohibit the filing of a merger application among two or more Class I railroads until at least 36 months have passed since the implementation of a previous merger of Class I railroads.

Such a merger moratorium would provide a breathing spell for rail shippers and receivers, as well as for the railroad industry itself, to adjust to the new service and competitive realities created by one merger before having to address the next merger proposal. It would also enhance the Board's ability to evaluate the competitive impact of the second merger, because the competitive relationships created by the first merger would at least have begun to emerge.

Edison Mission and Midwest Generation also urge the Board to consider "cumulative impacts and crossover effects" in all future major rail mergers, as the Board has announced that it will do in the BNSF/CN merger proceedings.

Edison Mission is one of the largest power producers in the world. Through its affiliate Midwest Generation, LLC, Edison Mission owns power generating facilities in northern Illinois with a total capacity of 9,510 megawatts, serving more than 3 1/2 million customers. Most of these plants are fueled with coal from the Powder River Basin, and they depend on reliable rail transportation to move 15 million tons of coal annually over the 1,100 miles from Wyoming to Illinois. The rapid succession of major rail mergers in the 1990's caused severe disruptions of rail service to these plants. The regulations and policies recommended by Edison Mission and Midwest Generation would assure that such disruptions are not repeated in the new decade.

Edison Mission's and Midwest Generation's position is detailed in the attached Statement.

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February 28, 2000

BEFORE THE
SURFACE TRANSPORTATION BOARD

STB Ex Parte No. 582

PUBLIC VIEWS ON MAJOR RAIL CONSOLIDATIONS

STATEMENT OF EDISON MISSION ENERGY COMPANY
AND MIDWEST GENERATION, LLC

This Statement is submitted to the Surface Transportation Board by Edison Mission Energy Company and its affiliate Midwest Generation, LLC.

Edison Mission Energy is one of the largest and most successful global power producers, with projects in Australia, Indonesia, Italy, New Zealand, the Philippines, Spain, Thailand, Turkey, and the United Kingdom, as well as the United States.

Midwest Generation acquired the fossil-fuel-fired generating assets of Commonwealth Edison Company in 1999 and owns seven generating stations and four combustion turbine sites in northern Illinois. These facilities have a total generating capacity of 9,510 megawatts of electricity, and under a Power Purchase Agreement with Commonwealth Edison Company they serve approximately 3,500,000 customers. Midwest Generation also supplies electricity into the regional grid and thence into service areas as far away as the east coast. Midwest Generation employs nearly 1,800 people in Illinois and Pennsylvania.

Midwest Generation burns coal in many of its generating stations and is heavily dependent on reliable rail transportation to move this coal from the point of production to the point of use. Six of its seven Illinois generating stations use coal that is delivered by rail 1,100 miles from the Wyoming Powder River Basin (PRB). We receive some 15 million tons of PRB coal each year, most originated by Union Pacific and the remainder by Burlington Northern Santa Fe. To carry this coal, Midwest Generation leases an active fleet of 4,031 rail cars.

As the Board is well aware, the rail mergers of the last decade caused tremendous disruption to established rail service patterns, reliability, and competitive relationships. Because Midwest Generation's business depends on reliable, cost effective rail service, Edison Mission and Midwest Generation are deeply concerned, based on the history of other recent rail mergers, that the BNSF/CN merger would inevitably cause a new round of service disruptions. To make matters worse, these disruptions would almost immediately be exacerbated on an exponential scale by the wave of responsive mergers that would certainly follow.

Midwest Generation and its predecessor Commonwealth Edison experienced severe service disruptions as a result of the western rail mergers of the 1990's. The merger of UP with CNW, which was approved by the Interstate Commerce Commission in 1995, resulted in severe degradation of the rail service received by Commonwealth Edison. The UP/CNW experience is particularly significant to the issues that the Board is now considering, because it was an "end-to-end" merger -- which is what BNSF and CN claim that their merger would be, and what the proponents of the next wave of mergers will claim that theirs would be as well. Moreover, there had been substantial coordination and cooperation between CNW and UP before the merger. Nevertheless, the integration of CNW into the UP system proved much more difficult than the proponents of the merger claimed that it would be. This was a much smaller-scale transaction than the BNSF/CN merger or the transcontinental mergers that the BNSF/CN merger will trigger.

Following only a year later, the UP/SP merger (approved by the ICC in 1996) compounded the service problems that Commonwealth Edison was already suffering as a result of the UP/CNW merger. UP assured its customers and the ICC that it would absorb CNW and shortly thereafter SP while maintaining service levels, but the result instead was universally recognized as a service "meltdown".

As a result of UP's back-to-back CNW and SP mergers, the cycle times for Commonwealth Edison's fleet of rail cars fell to 60% of contract-guaranteed levels. It took almost a year for service even to begin to show significant improvement. Commonwealth Edison had to invest in additional rail cars to assure delivery of adequate quantities of coal to meet its obligations to provide electricity to its customers. As a result, Midwest Generation today operates 10-12 excess trainsets, each consisting of approximately 120 railcars; each trainset represents an investment of $6.0 million, plus substantial storage and maintenance costs. Thus, even though UP has finally restored its service levels, Midwest Generation continues to bear $60-72 million of extra capital costs (and attendant storage and operating expenses) as a result of the service disruptions caused by the rail mergers of the '90's.

The UP "meltdown" was not a fluke. The other major rail mergers of the '90's also led to serious service problems. There were substantial service disruptions in connection with the BN/SF merger, and recently the take-over of Conrail by Norfolk Southern and CSX has caused severe disruptions, despite all the planning and all the promises to prevent "another UP/SP".

Experience teaches that a BNSF/CN merger would be accompanied by significant service problems, despite the familiar assurances to the contrary from the applicants. And then what about the next round of mergers, with their compounding service breakdowns, that must inevitably follow, as the five remaining U.S. and Canadian Class I rail systems play out the final round of their gigantic game of musical chairs? Edison Mission and Midwest Generation are still paying the price for the service disruptions that were caused by the rail mergers of the last decade. It is too soon to disrupt our business again with an new round of mergers.

Edison Mission and Midwest Generation applaud the Surface Transportation Board's decision in the BNSF/CN merger proceedings to broaden the scope of its review to include "cumulative impacts and crossover effects". We urge the Board to make this a permanent part of its review of all future major consolidations in the rail industry.

However, Edison Mission and Midwest Generation do not believe that increased scrutiny of forthcoming rail merger proposals alone is enough to protect the public interest at this time. Whatever may be the theoretical merits of a BNSF/CN merger – or the theoretical merits of the other mergers that will inevitably follow on approval of the BNSF/CN merger – it is simply too soon for another major rail merger.

It is too soon for two important reasons. First, customers of the rail industry are still reeling from the service disruptions caused by the recently approved merger of Conrail into the Norfolk Southern and CSX systems, and have only barely recovered from the even worse disruptions caused by the UP/SP merger. We simply cannot absorb another shock to the system now.

Second, the competitive impacts of the last several rail mergers have not yet been fully analyzed and understood. Until we know what the new competitive status quo is, the Board cannot reliably evaluate the competitive effect of a BNSF/CN merger and the responsive mergers that would follow it.

Therefore, Edison Mission and Midwest Generation urge that the Board adopt new regulations under which the Board may refuse to consider any merger application that is filed within 36 months after the implementation of a previous major merger.

Such a requirement for a pause in merger activity would provide a breathing spell for rail shippers and receivers, as well as for the railroad industry itself, to adjust to the new service and competitive realities created by one merger before having to address the next merger proposal. The merger pause would also mean that the Board would be in a better position to evaluate the competitive impact of the second merger, because the competitive relationships created by the first merger would at least have begun to emerge.

Of course, there may be circumstances in which a pause between mergers is not necessary. Therefore, the new regulations should allow merger applicants to seek a waiver from the Board that would allow them to file their application within the 36-month period. However, unless the Board were convinced that a new merger could be effected without injury to the public, the pause would be required.

Attached to this Statement is the text of proposed regulations addressing both cumulative and crossover effects and the timing of rail merger applications. Edison Mission and Midwest Generation urge the Board to adopt such regulations immediately and to make them applicable to the BNSF/CN merger application, as well as to its successors.

In addition, Edison Mission and Midwest Generation believe that there are several other changes that the Board should consider making to the way that it evaluates rail mergers. We expect that other parties will make similar recommendations, so we summarize them only briefly:

1. The Board should reconsider its willingness to tolerate "3 to 2" reductions in the number of rail carriers serving particular markets. The loss of a third carrier can significantly degrade a rail-dependent

shipper's competitive position, even when the shipper does not currently use the third carrier. For example, Midwest Generation has the benefit today of potential source competition from eastern or midwestern coal that could be delivered by eastern carriers. Such potential competition limits to some degree the market power that UP and BNSF now exercise over us. Before the UP/SP merger, we were able to obtain Utah/Nevada coal from SP; the merger eliminated SP as a possible competitor of UP. Even though the ICC conditioned approval of the UP/SP merger on giving BNSF access to Utah to restore the lost competition, we have seen no evidence of competition in that market. We believe that the Board should be reluctant to approve any merger that would reduce the number of independent rail competitors serving rail dependent customers.

2. The Board should abandon the simplistic "one lump" theory, which holds that current partial monopolization of a rail route means that shippers would suffer no harm from a merger that would expand that monopoly. The real world does not work that way.

3. The Board should require proponents of every rail merger to include in their application a detailed description of their plans for implementing the merger, which should demonstrate that the merger can be accomplished without significant service degradation. The Board should require merger applicants to provide concrete assurances to

their customers that service levels will be maintained, with penalties if those assurances are not met. The Board should not approve any merger unless it finds, on the basis of a complete evidentiary record, that the merger can be implemented without serious service disruption.

4. The Board should recognize the dynamic nature of transportation economics by considering, with respect to each proposed merger, not only its effect on current competition and service, but also the extent to which it may interfere with future improvements in competition and service. For example, although the BNSF/CN merger would not reduce the number of rail carriers currently serving the Powder River Basin, it would as a practical matter foreclose several possible ways through which a third rail carrier might be introduced into the market. For example, the Board is well aware of the plan by the Dakota, Minnesota & Eastern to extend its rail lines into the PRB. The BNSF/CN merger would eliminate the former IC as a "friendly" east-end connection for DM&E. A responsive merger by UP, which is almost certain to follow approval of a BNSF/CN merger, would likely eliminate other potential friendly connections. The same is true of other possible options for third-carrier access to the PRB. The prospect looms that in the very near future, shippers throughout the United States and Canada will

face a rail network comprised of two huge transcontinental railroads, and in such a world shippers' competitive choices will be few indeed.

Accordingly, Edison Mission Energy and Midwest Generation urge the Surface Transportation Board to adopt the measures described in this statement to lessen the adverse impact of future rail mergers on the American economy.

Respectfully submitted,

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February 28, 2000

PROPOSED NEW REGULATIONS ON MERGERS

§ 1180.1 General policy statement for merger or control of at least two Class I railroads.

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(g) *Cumulative impacts and crossover effects.* [Revised] The Board recognizes that a major transaction, if approved and implemented, may trigger yet another round of major transactions, as other railroads seek to position themselves and their customers to meet the competitive effects of the first transaction. Deferring consideration of cumulative impacts and crossover effects to the later proceedings may impede the Board's ability to assess fully the impacts of the first transaction and to structure effective remedies for competitive and other problems that may be identified. Therefore, in reviewing each major transaction the Board will consider cumulative impacts and crossover effects of any subsequent major transaction that are likely to be triggered by the pending transaction. Applicants and other interested persons may submit, and the Board will consider, evidence respecting the cumulative impacts and crossover effects that are likely to occur in the wake of a proposed transaction. Similarly, parties may address, and the Board will consider, the effect of the proposed transaction and any likely subsequent transactions, that would produce further significant consolidation in the industry, upon the statutory goals embodied in 49 U.S.C. 10101, with particular attention to those aimed at fostering sound and competitive economic conditions in the U.S. railroad industry.

(h) *Public participation.* [No change.]

(i) *Timing requirements for applications to approve major transactions.* [New] It is significantly more difficult for the Board to assess the effect on the public interest of each proposed major transaction if two or more applications are filed in rapid succession. Therefore, on and after January 1, 2000, the Board will not accept for filing any application for approval of a major transaction (other than a responsive application) unless the prefiling notification was filed at least 36 months after the implementation of the most recent major transaction approved by the Board. The Board may waive this limitation if it finds that the earlier filing of a particular application would not materially interfere with the Board's ability to assess the effect of the transaction on the public interest.